

"substantially excessive, disregarding 'far less restrictive and precise means.'" Board of Trustees, 492 U.S. at 479, 109 S. Ct. at 3034 (quoting Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 476, 108 S. Ct. 1916, 1923 (1988)). For example, in Posadas de Puerto Rico Associates v. Tourism Co., 478 U.S. 328, 344, 106 S. Ct. 2968, 2978 (1986), the Court upheld a total ban on advertising for casino gambling, noting that it was "up to the legislature to decide" on the best means of discouraging gambling. And in Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 101 S. Ct. 2882 (1981) (plurality opinion), the Court approved a total ban on off-site billboard advertising on the ground that the billboard ban served the city's traffic and esthetic concerns. See also City of Cottage Grove v. Ott, 395 N.W.2d 111 (Minn. Ct. App. 1986) (upholding city ordinance banning commercial billboard advertising).

In applying the Central Hudson test, the Court must consider that the appellant's commercial solicitations in this case are aimed at citizens in a "nonpublic forum"--their homes. Since the home is a "nonpublic forum," greater restrictions may be placed on access to citizens in their homes than are permissible in a public forum. See Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788, 800, 105 S. Ct. 3439, 3448 (1985) (explaining that "[a]ccess to a nonpublic forum . . . can be restricted as long as the restrictions are 'reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view'"). The home, in fact, is

the most private place in our society, and reasonable legislative efforts to protect privacy in the home must be upheld.

Consumers are frustrated and offended by the intrusion into their homes caused by automated telephone solicitations. Indeed, as communications technologies rapidly continue to change, the technological intrusions into our lives become more and more invasive, threatening and disruptive. Legislative bodies must be permitted to respond to technological developments by protecting the rights of citizens to security, peace and privacy within their homes. As established below, the ADAD statute is a reasonable legislative effort to protect residential privacy, and must be upheld under the Central Hudson test.

B. The ADAD Statute Bears A Presumption Of Constitutionality.

In upholding the trial court's injunction, the Court of Appeals correctly observed that the ADAD statute "bear[s] a strong presumption of constitutionality." Appellant's App. A8. The Court of Appeals relied on Minneapolis Federation of Teachers v. Obermeyer, 275 Minn. 347, 356, 147 N.W.2d 358, 365 (1966), in which this Court held that the burden is on the party challenging a statute to establish that it is not constitutional. See also Dimke v. Finke, 209 Minn. 29, 32, 295 N.W. 75, 78 (1940) (stating that "[e]very law is presumed to be constitutional in the first instance"). This presumption of constitutionality continues to apply with full force when, as here, a law or regulation governs speech in a "nonpublic forum." See United States Postal Serv. v. Council of Greenburgh Civic Assoc., 453 U.S. 114, 132-34, 101 S. Ct. 2676, 2686-87 (1981) (upholding a postal regulation

banning non-mailed materials from mailboxes, on the ground that a mailbox is not a "public forum").⁶

Nevertheless, appellant contends that the well-established presumption of constitutionality does not apply to the ADAD statute. Appellant, in support of his position, invokes inapplicable "prior restraint" cases involving content-based injunctions against fully-protected political speech. See, e.g., New York Times v. United States, 403 U.S. 713, 91 S. Ct. 2140 (1971). In such cases, it is true that the courts closely scrutinize the government's asserted need for a prepublication "prior restraint" by requiring, for example, that "national security" interests are at stake. However, these "prior restraint" cases are simply not applicable, since there is no prior restraint on appellant's speech.⁷

Even if the State did, however, bear the burden of showing that the ADAD statute meets constitutional requirements, the State clearly has done so. Indeed, both the trial court and the Court of Appeals, in applying the Central Hudson test, correctly found that the State has established that the ADAD statute promotes legitimate state interests and constitutes a reasonable restriction on commercial speech.

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6. Because the regulation in Council of Greenburgh involved access to a nonpublic forum--a residential mailbox--the Court granted nearly total deference to the Postal Service's regulation and did not even subject it to a "time, place and manner" analysis. 453 U.S. at 132-34, 101 S. Ct. at 2686-87.
 7. The State more fully addresses appellant's argument that the ADAD statute constitutes a "prior restraint" in section III. E. below.

**C. The ADAD Statute Is A Reasonable
Restriction On Commercial Activity Under
The Central Hudson Test.**

- 1. Misleading commercial solicitations
are not protected by the first
amendment.**

The first prong of the Central Hudson test concerns the nature of the speech involved. To be entitled to first amendment protection, the speech must "at least concern lawful activity and not be misleading." Central Hudson, 447 U.S. at 566, 100 S. Ct. at 2351. If commercial speech is misleading, it has no first amendment protection and may be banned.

The telephone advertisements for the UACC credit card are misleading in numerous respects. The solicitations falsely imply, for example, that the UACC credit card provides a unique benefit in providing credit information to credit bureaus, falsely imply that all other credit cards also have an annual \$30 fee, and fail to disclose a "switching fee" to change long distance carriers. Appellant's App. A31-A36. Moreover, the consumer is required to call two "900" numbers and incur two separate \$25 fees before learning the truth--that UACC "sponsors" the consumer for a \$300 Visa or MasterCard only after the consumer has charged and paid for \$500 worth of goods on the UACC credit card. Appellant's App. A31-A37. This is not constitutionally protected speech. It is deceptive advertising unprotected by the first amendment.⁸

8. The trial court found that the evidence is "insufficient at this stage of the proceedings to sustain a finding that the defendants' commercial telephone solicitations are, as a matter of law, not entitled to constitutional protections." Appellant's App. A133. If the trial court ultimately finds that appellant's promotions are misleading, these solicitations would have no first amendment protection and could be banned altogether.

Even assuming, however, that this case involved commercial speech that, unlike appellant's solicitations, was not patently misleading, the State's restrictions on the use of automated telephone solicitations are valid and reasonable regulations. In other words, even if a case involving legitimate, nondeceptive commercial speech were before this Court, the regulations satisfy the remaining three prongs of the Central Hudson test and therefore must be upheld.

2. The governmental interests in protecting privacy and preventing fraud are substantial.

The State's ADAD statute serves the State's important interests of protecting the peace and privacy of citizens in their homes, and preventing telemarketing fraud. The trial court specifically found that "the State of Minnesota has a substantial interest in upholding the expectations of privacy of its citizens, who are at the same time subscribers to telephone service, and it has a substantial interest in protecting its citizens from fraudulent or misleading business practices that affect them as consumers." Appellant's App. A132. The Court of Appeals similarly determined that the State's dual interests in protecting residential privacy and preventing fraud are "substantial." Appellant's App. A6-A7.

In numerous cases, the United States Supreme Court has recognized that citizens enjoy a heightened level of privacy "within their own walls." Erisby v. Schultz, 487 U.S. 474, 485, 108 S. Ct. 2495, 2502 (1988). In upholding a ban on residential

picketing in Frisby v. Schultz, the Court emphasized the citizen's right to avoid unwelcome intrusions within the home:

One important aspect of residential privacy is protection of the unwilling listener. Although in many locations, we expect individuals simply to avoid speech they do not want to hear . . . , the home is different. . . . [A] special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions.

487 U.S. at 484-85, 108 S. Ct. at 2502. The Court then underscored that "we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom." Id.; see also State v. Scholberg, 412 N.W.2d 339 (Minn. Ct. App. 1987) (reinstating trespassing charges against protesters on private sidewalk in front of medical building).

Another case involving judicial protection of residential privacy is Rowan v. United States Post Office Department, 397 U.S. 728, 90 S. Ct. 1484 (1970). In that case, the Court upheld a postal regulation allowing residents to delete their names from mailing lists to prevent unwanted mailings. The Court reasoned as follows:

Weighing the highly important right to communicate . . . against the very basic right to be free from sights, sounds, and tangible matter we do not want, it seems to us that a mailer's right to communicate must stop at the mailbox of an unreceptive addressee. . . .

Nothing in the Constitution compels us to listen to or view any unwanted communication, whatever its merit; we see no basis for according the printed word or pictures a different or more preferred status because they are sent by mail.

397 U.S. at 736-37, 90 S. Ct. at 1490. And in FCC v. Pacifica Foundation, 438 U.S. 726, 98 S. Ct. 3026 (1978), the Court upheld a ban on "offensive" radio broadcasts on the ground that the "individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." 438 U.S. at 748, 98 S. Ct. at 3040. The Court added that "this Court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from public dialogue." 438 U.S. at 749, 98 S. Ct. at 3040 n.27 (quoting Cohen v. California, 403 U.S. 15, 21, 91 S. Ct. 1780, 1786 (1971)).

The right to privacy in the home unquestionably includes the right to be free from harassing telephone calls. Indeed, courts around the country have repeatedly recognized that a residential telephone is not a "public forum" that provides unrestricted access to the person in the home. In People v. Taravella, 350 N.W.2d 780, 783 (Mich. Ct. App. 1984), the court, in upholding a telephone harassment statute, observed that "the privacy interest of a listener in the privacy of his home will be accorded greater protection, along with the commensurate restrictions on unwanted discourse, than would be permitted in a public forum." Similarly, in Yates v. Commonwealth, 753 S.W.2d 874, 875 (Ky. Ct. App. 1988), the court stated that communication over the telephone "intrudes upon a justifiable privacy interest of the recipient and therefore, this right to communicate must be considered in light of a person's right 'to be left alone.'" And in State v. Anonymous (1978-4), 389 A.2d

1270, 1273-74 (Conn. Super. Ct.), the court noted that a telephone is "a device readily susceptible to abuse as a constant trespasser upon our privacy." Other cases recognizing a citizen's privacy interests in a home telephone include Gormley v. Director, Connecticut State Department of Probation, 632 F.2d 938 (2d Cir.), cert. denied, 449 U.S. 1023, 101 S. Ct. 591 (1980) (upholding conviction under telephone harassment statute); and City of Seattle v. Huff, 767 P.2d 572, 574 (Wash. 1989) (upholding telephone harassment statute, noting that "the private nature of discussion over the telephone precludes it from being a public forum for open debate").⁹

By restricting the use of automated telephone advertisements, the Minnesota legislature specifically sought to protect the privacy of citizens within their homes. Senator Allan Spear, the Senate author, testified that "the use of these [ADAD machines] is becoming more and more frequent, people are finding them more and more intrusive in their private lives, and I think we need at this point, before these machines proliferate any more, to begin a program of state regulation." Automatic Dialing-Announcing Devices, 1987: Hearing on S.F. 184 Before the Senate Commerce Committee (Feb. 19, 1987) (hereinafter "ADAD Hearings"). Senator Fritz Knaak, in voicing his support of the bill, similarly noted that he had received a large volume of

9. Each of these cases involved prosecutions for telephone "harassment" under state law. Minnesota also has a telephone harassment statute, which makes it a misdemeanor to repeatedly make telephone calls "with intent to abuse, threaten or harass," or to cause "the telephone of another repeatedly to ring, with intent to harass any person at the number called." Minn. Stat. § 609.79 (1990).

complaints concerning "harassment" by automated solicitations.
Id.

The recently-enacted "Telephone Consumer Protection Act of 1991" underscores the State's substantial interest in protecting residential privacy. In that Act, the United States Congress imposed a nationwide ban on unsolicited automated commercial telephone solicitations to residential phones. Respondent's App. A3. In the "Findings" section of the bill, the Congress explicitly stated that "[e]vidence compiled by the Congress indicates that residential telephone subscribers consider automated or prerecorded telephone calls, regardless of the content or the initiator of the message, to be a nuisance and an invasion of privacy." 105 Stat. 2394 (section 2(10)). Respondent's App. A2. Thus, the United States Congress has reached the same conclusion as the Minnesota legislature--that automated commercial solicitations constitute an invasion of a citizen's right to peace and privacy within the home.¹⁰

Consumer complaints to the Attorney General's Office confirm that citizens are frustrated and harassed by automated advertisements for "vacations," "credit cards," and various "prizes" and "awards." The most offensive example of harassment involved the hundreds of calls placed by appellant Hall to phones in the coronary care and intensive care units of Abbott Northwestern Hospital. In other complaints filed with the Attorney General's Office, citizens have complained that automated sales promotions constitute an "invasion of privacy,"

10. See supra note 3 for citation of the Telephone Consumer Protection Act of 1991.

and "malicious use of the telephone." Appellant's App. A112-A120. Undeniably, the State has a strong interest in protecting residential peace and privacy and preventing harassment by telemarketers using automated telephone solicitations.¹¹

In addition to protecting the fundamental privacy rights of its citizens, the State has a strong interest in preventing deceptive advertising and ensuring that consumers receive accurate, complete and nonmisleading information when a telemarketer calls a home to present a commercial sales pitch. Problems with telemarketing fraud continue to plague the state and to create law enforcement problems. In 1990 alone, the Attorney General's Office received 805 written complaints involving telemarketing problems, scams and frauds. Appellant's App. A109-A111.

Since telemarketing scams continue to assault Minnesota consumers, the State has a significant interest in attempting to reduce fraud by requiring a live operator to introduce the call, identify the company placing the call, explain the true commercial purpose of the call, and obtain consent before the prerecorded advertisement is delivered. As developed below, all of these safeguards help eliminate fraud and reduce the likelihood that consumers are misled or confused by telemarketers using the phones for promotional advertising.

11. The legislative history to the Telephone Consumer Protection Act of 1991 similarly shows that "[c]onsumers are especially frustrated because there appears to be no way to prevent these calls," and concludes that consumers view the calls as "a nuisance and an invasion of privacy." Senate Comm. on Commerce, Science, and Transportation, S. Rep. No. 178, 102d Cong., 1st Sess. 1 (1991). Respondent's App. B3-B4.

3. The ADAD statute directly advances the state's interests in protecting privacy and reducing fraud.

The third prong of the Central Hudson test requires the regulation on commercial speech to "directly advance the governmental interest asserted." The trial court and the Court of Appeals correctly found that the ADAD statute directly advances both the State's interest in protecting residential privacy and the interest in reducing fraudulent telephone solicitations. Appellant's App. A7.

First, the ADAD statute protects the privacy interests of Minnesota citizens by eliminating the harassment caused by automated telephone advertisements. These calls are, as the legislature determined, an invasion of residential privacy. By prohibiting unsolicited automated commercial calls, the ADAD statute directly advances the State's interest in protecting the privacy interests of citizens in their homes.¹²

While acknowledging that automated solicitations can be an unwelcome intrusion, the Minnesota Civil Liberties Union ("MCLU") contends that citizens who do not wish to receive automated solicitations should "simply hang up." Brief of MCLU as Amicus Curiae at 7. This argument ignores the plain fact that the intrusion occurs at the time the resident answers the phone and hears the automated message. In fact, asking citizens to

12. The United States Congress similarly determined, in its "Findings" section of the Telephone Consumer Protection Act of 1991, that "[b]anning such automated or prerecorded telephone calls, . . . is the only effective means of protecting telephone consumers from this nuisance and privacy invasion." 105 Stat. 2394-95 (section 2(12)). Respondent's App. A2.

hang up "is like saying that the remedy for an assault is to run away after the first blow." FCC v. Pacifica Found., 438 U.S. 726, 748, 98 S. Ct. 3026, 3040 (1978). The large volume of consumer complaints shows, moreover, that Minnesota residents are not satisfied by just "hanging up" time after time in response to an endless barrage of automated solicitations.

Further, it is impossible for a citizen to register his or her desire not to continue to receive solicitations if there is no live operator introducing the call. The absence of a live operator, in fact, made it impossible for officials at Abbott Northwestern Hospital to shut off the ten-day barrage of automated solicitations delivered by appellant Hall to hospital phones. Private citizens in their homes are subject to the same frustrations in trying to put an end to an inundation of unwanted automated calls without a live operator on the line.

The MCLU's contention that the ADAD statute "erects a wall" between marketers and citizens is also incorrect. The statute allows telemarketers to continue to contact residents in their homes, as long as a live operator introduces and explains the call. If the resident consents, the marketer may play a recorded message. Thus, the statute allows marketers to continue to solicit consumers by telephone, but ensures that it is the consumer who decides whether to receive a recorded message. By allowing the consumer to decide whether to hear a recorded sales

pitch, the ADAD statute promotes the state's interest in protecting residential privacy.¹³

The ADAD statute also directly advances the State's interest in preventing telemarketing fraud. Unfortunately, telemarketing solicitations frequently are designed to deceive, and consumers are often ensnared by false, deceptive and misleading promotions. For example, telemarketers may ask consumers, under false pretenses, to provide credit card information that may later be used to initiate unauthorized credit card charges. Or, the sales pitch may be disguised as a "survey" or "study," or may be designed to appear to be a call from a governmental agency or a nonprofit organization. These and other types of fraud can be reduced by the requirement that a live operator identify the company placing the call and explain that the call is truly a commercial promotion. These safeguards reduce the likelihood that consumers will be deceived by fraudulent commercial solicitations.

13. The MCLU contends that "an individuals privacy is invaded when they receive any call solicitation, live or ADAD" [sic]. Brief of MCLU as Amicus Curiae at 11. Thus, the MCLU does not deny that automated calls constitute an invasion of privacy--rather, it contends that live calls are an equally great invasion of privacy. While it may be true that live solicitations are also an invasion of privacy, the legislature has determined that automated solicitations are an even greater intrusion for citizens in their homes. The complaints to the Attorney General's Office bear this out.

Moreover, to the extent the MCLU objects to the legislature's decision to address automated, but not live, solicitations, this argument appears to raise a fourteenth amendment equal protection claim. There is no equal protection claim before this Court. In any event, the ADAD statute's distinction between automated and live solicitations is surely a reasonable legislative distinction.

Defendant's calls for Casino Marketing and UACC illustrate the confusion caused by automated solicitations. The Casino Marketing solicitation falsely implied that the recipient was the "winner" of a Las Vegas vacation, and instructed the recipient to call an "800" number for more information. In truth, the consumer is required to purchase a travel package and has "won" nothing. The UACC calls are also confusing, misleading and incomplete. In order to learn the truth about the UACC credit card, the consumer must make two separate calls to "900" numbers and incur \$50 in charges. By requiring a live operator to introduce the call and explain the true purpose of the call, the costs involved, and the nature of the goods and services being promoted, the ADAD statute is designed to eliminate the type of deception and confusion created by the Casino Marketing and UACC promotional calls.¹⁴

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14. Appellant claims in his brief that the State "seeks to ban . . . [appellant's] non-commercial solicitation of political contributions through the Incumbent Removal Service." Appellant's Brief at 37. This argument is, at best, disingenuous.

Contrary to appellant's claim, the State has never attempted to enforce the ADAD statute against noncommercial solicitations. It is true, as noted in the Supplemental Affidavit of Lisa J. Sieben, that the Attorney General's Office has received complaints concerning appellant's solicitations for the so-called "Incumbent Removal Service." As appellant knows, however, the State has not sought to enforce the ADAD statute to prohibit these solicitations. Appellant's App. A111.

Finally, it should be noted that there is no constitutional basis for objecting to a statute which restricts commercial speech, but does not apply to noncommercial speech. See City of Cottage Grove v. Ott, 395 N.W.2d 111, 114-15 (Minn. Ct. App. 1986) (upholding ordinance banning commercial billboards, but allowing noncommercial billboards).

Finally, the type of disclosures required by the ADAD statute are consistent with disclosure requirements in a variety of other commercial contexts. In Minnesota, a variety of statutes require disclosure of commercial information to consumers, including the Home Solicitations Sales Act, Minn. Stat. §§ 325G.06-.11 (1990), the Personal Solicitations Act, Minn. Stat. §§ 325G.12-.14 (1990), and the Club Contracts Act, Minn. Stat. §§ 325G.23-.28 (1990). Significantly, Minnesota law also prohibits the use of automatic dialing-announcing devices by collection agencies for collection of consumer debts. Minn. Stat. § 332.37 (13) (1990). In sum, the disclosures required by a live operator under the ADAD statute serve the same purpose as a variety of similar state disclosure laws that are designed to ensure that consumers are fully and accurately informed before entering into consumer transactions.

4. The ADAD statute is narrowly tailored to serve the State's interests.

The final prong under the Central Hudson test requires regulations on commercial speech to be "not more extensive than is necessary to serve [the State's] interest." In its recent decision in Board of Trustees v. Fox, 492 U.S. at 473-81, 109 S. Ct. at 3033-35, the Supreme Court clarified this final element of the Central Hudson analysis and rejected a requirement that restrictions on commercial speech satisfy a "least restrictive means" test. In other words, the test does not require "that there be no conceivable alternative, but only that the regulation not 'burden substantially more speech than is necessary to

further the government's legitimate interests.'" 492 U.S. at 478, 109 S. Ct. at 3034 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 799, 109 S. Ct. 2746, 2758 (1989)). Under this standard, regulations on commercial speech will be upheld as long as they are "narrowly tailored to achieve the desired objective." 492 U.S. at 480, 109 S. Ct. at 3035. This test, in short, requires a reasonable "'fit' between the legislature's ends and the means chosen to accomplish those ends." Id. (quoting Posadas, 478 U.S. at 341, 106 S. Ct. at 2977). As long as the fit is "reasonable," the Court will "leave it to governmental decisionmakers to judge what manner of regulation may best be employed." Id.

Applying these principles in the present case, the Court of Appeals concluded that "[i]n view of the intrusive effect of ADAD solicitations and the potential for fraud and overreaching, the legislature's decision to require a live operator amounts to a reasonable fit." Appellant's App. A7. The reasonableness of the legislative action is underscored by the fact that the legislature thoroughly debated and considered the ADAD statute before determining that the requirements adopted best served the State's interests. See ADAD Hearings. The legislature, in fact, rejected a more restrictive bill that would have banned the use of automated solicitations altogether. Id. It is thus clear that in adopting the current ADAD law, the legislature attempted to strike the proper balance that recognized the interests on all sides.

Moreover, the Court should consider, in determining the reasonableness of the ADAD law, that the bill had wide public and industry support at the time it passed. Those testifying in favor of the bill included representatives from the National Direct Marketers Association (DMA) and the Minnesota Retail Merchants. The DMA representative expressed his view that the restrictions in the ADAD bill were "reasonable." See ADAD Hearings (statement of John Knapp, Winthrop & Weinstein, representing the DMA).¹⁵

The reasonableness of the ADAD statute is further illustrated by the fact that the United States Congress and state legislatures around the country have similarly acted to restrict the use of automatic dialing-announcing devices for delivering automated solicitations.¹⁶ The State is unaware of any successful constitutional challenge to any of these statutes. In Oregon, a constitutional claim similar to defendant Hall's claim in this case was rejected by the Circuit Court. Moser v. Frohnmayer, No. 89C12416 (3d Dist. Aug. 10, 1990) (order granting summary judgment in favor of defendants). Appellant's App. A123.

15. Significantly, the DMA and other telemarketing groups also supported the ban on automated calls in the Telephone Consumer Protection Act of 1991. Senate Comm. on Commerce, Science, and Transportation, S. Rep. No. 178, 102d Cong., 1st Sess. 3 (1991). Respondent's App. B5.

16. Examples of statutes restricting automated solicitations include: Cal. Pub. Util. Code § 2871; Haw. Rev. Stat. Ann. § 445-184; Ind. Code Ann. § 24-5-14-1; La. Rev. Stat. Ann. § 51:1742; Miss. Code Ann. § 77-3-41; Neb. Rev. Stat. § 87-307; N.Y. Gen. Bus. Law § 399-p.; Or. Rev. Stat. § 759.290; Tex. Bus. & Com. § 35.47; and Wash. Rev. Code Ann. § 80.36.400.

In arguing that the ADAD statute is impermissibly restrictive, appellant Hall claims that the legislature instead should have adopted a bill that provides for creation of a list of residents who do not wish to receive automated telephone advertisements. Appellant's Brief at 27. The legislature considered and rejected this very proposal in view of strong opposition to such a requirement. Telemarketers opposed this idea, arguing that the approach eventually adopted would be more reasonable, and that it would be costly and difficult for telemarketers to comply with a central list of persons who do not wish to receive prerecorded promotional calls. See ADAD Hearings.

By asking this Court to overturn the Minnesota ADAD statute, appellant Hall seeks to have this Court "second guess" the judgment of the legislature regarding the most effective means of regulating telemarketing. Board of Trustees v. Fox, 492 U.S. at 478, 109 S. Ct. at 3034. However, as long as there is a "reasonable fit" between the regulation and the State's interests, the Court may not override the legislature's judgment. The State's ADAD statute serves the interests of the citizens of Minnesota by protecting residential peace and privacy and

reducing the likelihood of telemarketing fraud. Accordingly, the ADAD statute is a reasonable regulation of telephone advertising that must be upheld.¹⁷

**D. Appellant's Reliance On Cases Involving
Restriction On Noncommercial Speech Is
Misplaced.**

Throughout his brief, appellant invokes cases involving restrictions on fully-protected noncommercial, as opposed to commercial, speech. Since the present case concerns commercial speech, which is subject to greater regulation than noncommercial speech, appellant's reliance on these cases is misplaced.

First, appellant relies on several door-to-door solicitation cases. Unlike the present case, these cases all concerned fully-protected political or religious speech. Significantly, in the one Supreme Court decision to date involving commercial door-to-door solicitations, the Court upheld the defendant's conviction for violating a local door-to-door

17. In the trial court, appellant challenged the time restrictions in the ADAD statute, which prohibit commercial solicitations before 9:00 a.m. and after 9:00 p.m. Appellant has not raised this issue on appeal. Nevertheless, it should be noted that the same standards applied above for regulations on commercial speech apply as well to the time restrictions in the ADAD statute. In short, the State unquestionably has an interest in preventing unwanted intrusions into the home in the early morning hours and late evening hours, and the time restrictions in the ADAD statute are reasonable restrictions which directly advance the State's interests in preventing such intrusions. Indeed, the time restrictions in the ADAD statute serve the same purpose as a typical city noise ordinance that applies in the late evening and early morning hours. By restricting calls late at night and early in the morning, the statute stops the intrusion into the home without forcing citizens, as defendant recommended in the trial court, to "remove their phones from the receivers." Memorandum of Points and Authorities in Support of Defendant Larry Hall's Motion for Temporary Injunction at 17.

sales ordinance. Breard v. City of Alexandria, 341 U.S. 622, 71 S. Ct. 920 (1951). The Court in Breard expressly relied upon the "commercial feature" of the defendant's activities in upholding his conviction.

Moreover, in Breard the Court explicitly recognized the constitutional distinction between "commercial" and "religious" door-to-door canvassing. Eight years before its decision in Breard, the Court had overturned a conviction of religious canvassers under a city ordinance banning door-to-door solicitations. Martin v. Struthers, 319 U.S. 141, 63 S. Ct. 882 (1943). In distinguishing Martin v. Struthers, the Breard Court explained that Martin v. Struthers involved "no element of the commercial . . . and the opinion was narrowly limited to the precise fact of the free distribution of an invitation to religious services." 341 U.S. at 643, 71 S. Ct. at 933. Thus, the only distinguishing factor between these two cases was that Breard involved "commercial" speech, and Martin involved religious, noncommercial speech. In the case of the "commercial" solicitations in Breard, the defendant's conviction was upheld.¹⁸

Nor are the cases cited by appellant involving charitable fundraising relevant, since "the solicitation of charitable contributions is protected speech." Riley v. National

18. In his brief, defendant argues that Breard is no longer good law. However, as recently as 1986, the Supreme Court cited Breard in stating that "the States . . . can subject newspapers to generally applicable economic regulations without creating constitutional problems." Arcara v. Cloud Books, Inc., 478 U.S. 697, 704, 106 S. Ct. 3172, 3176 (1986) (quoting Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 581, 103 S. Ct. 1365, 1369 (1983)). It is thus clear that the Supreme Court continues to recognize the validity of the Breard decision.

Fed. of the Blind, 487 U.S. 781, 789, 108 S. Ct. 2667, 2673 (1988). The Court in Board of Trustees specifically distinguished Riley on this ground. 492 U.S. at 474, 109 S. Ct. at 3031. Similarly, Cohen v. California, 403 U.S. 15, 91 S. Ct. 1780 (1971), concerned a political statement on a T-shirt. These cases did not concern "commercial" activities, and are not relevant to the present case.

It should be noted, however, that even in cases involving fully protected noncommercial speech, the courts recognize the validity of meaningful disclosure requirements. In Riley, for example, the Court noted that "nothing in this opinion should be taken to suggest that the State may not require a fundraiser to disclose unambiguously his or her professional status." Riley, 487 U.S. at 799, 108 S. Ct. at 2679 n.11. And in Famine Relief Fund v. West Virginia, 905 F.2d 747 (4th Cir. 1990), the court upheld various disclosure requirements for charities, including disclosures concerning how funds will be used. See also Telco Communications, Inc. v. Barry, 731 F. Supp. 670 (D.N.J. 1990) (upholding disclosure requirement of professional fundraiser status). Thus, even when fully-protected noncommercial speech is involved, the courts permit meaningful disclosure requirements to protect the public from fraud.

Finally, appellant's reliance on Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 103 S. Ct. 2875 (1983), is misplaced for two reasons. First, that case involved a content-based restriction aimed at particular products--birth control devices. In contrast, the ADAD statute is content-neutral and applies to

all commercial solicitations. Second, Bolger involved a total ban on communications with the public. The ADAD statute does not, as seen, ban commercial telephone solicitations. It simply requires that before an automated message is played, the consumer must consent to receive the solicitation after a live operator introduces the call. Thus, unlike the case in Bolger, it is the consumer who ultimately chooses whether or not to receive the sales pitch from the advertiser.¹⁹

As discussed, the cases relied upon throughout appellant's brief concerned restrictions on fully-protected noncommercial speech, or other impermissible content-based restrictions on speech. The ADAD statute, in comparison, involves reasonable content-neutral restrictions on commercial activity. These restrictions are justified by legitimate state interests in protecting residential privacy and preventing fraud. The ADAD statute therefore must be upheld.

E. The ADAD Statute Is Not A "Prior Restraint" Upon Speech.

Appellant incorrectly asserts that the Minnesota ADAD statute is an impermissible "prior restraint" on speech. The Court of Appeals properly rejected appellant's prior restraint claim, explaining that unlike prior restraints, "the ADAD statute in this case merely regulates the manner by which certain

19. One of the principal cases discussed in the MCLU brief, Fane v. Edenfield, 945 F.2d 1514 (11th Cir. 1991), also involved a content-based restriction on commercial speech. There, the restriction on in-person solicitations applied only to certified public accountants. The court noted that the statute "is not content neutral. It is a speaker-specific, unqualified ban on a category of expressive activity." 945 F.2d at 1519.

telephone solicitations may be presented to consumers."

Appellant's App. A8.

In support of his prior restraint claim, appellant cites numerous well-known, but inapplicable, cases involving prepublication restraints on fully-protected political speech. New York Times Co. v. United States, 403 U.S. 713, 91 S. Ct. 2140 (1971), concerned an injunction against publication of the "Pentagon Papers"; Nebraska Press Association v. Stuart, 427 U.S. 539, 96 S. Ct. 557 (1976), involved a "gag order" prohibiting publication of accounts of confessions or admissions made by a criminal defendant; and Near v. Minnesota, 283 U.S. 697, 51 S. Ct. 625 (1931), involved an injunction to prohibit a newspaper from publishing "scandalous and defamatory" material.

Although these cases represent the most significant freedom of the press decisions in our nation's history, they simply are inapplicable to the issues before this Court. Each of these "prior restraint" cases involved content-based injunctions against newspapers to prohibit publication of protected political speech. The ADAD statute, however, is not concerned with the content of appellant's commercial messages, but only with the manner in which these messages are delivered. The statute simply requires an operator to make certain disclosures and obtain consent before playing recorded advertisements to citizens in their homes. There is no basis for claiming that these limited restrictions on commercial activity amount to an impermissible "prior restraint."

In truth, the Minnesota ADAD statute in this case is no more of a "prior restraint" than the local ordinance banning commercial messages on billboards, upheld in City of Cottage Grove v. Ott, 395 N.W.2d 111 (Minn. Ct. App. 1986), or the ordinance banning sound trucks, upheld in Kovacs v. Cooper, 336 U.S. 77, 69 S. Ct. 448 (1949). As in Kovacs, this case involves not a restriction on speech--but a reasonable restriction on the technology used to disseminate commercial messages to consumers. As explained by Justice Frankfurter in a concurring opinion in Kovacs:

The various forms of modern so-called "mass communications" raise issues that were not implied in the means of communication known or contemplated by Franklin and Jefferson and Madison. . . . Only a disregard of vital differences between natural speech, even of the loudest spellbinders, and the noise of sound trucks would give sound trucks the constitutional rights accorded to the unaided human voice. Nor is it for this Court to devise the terms on which sound trucks should be allowed to operate, if at all. These are matters for the legislative judgment controlled by public opinion.

336 U.S. at 96-97, 69 S. Ct. at 458.

Just as the sound truck in Kovacs amplified the voice of the speaker, the telephone device in this case mechanically enhances the advertiser's ability to communicate a commercial message. Thus, Justice Frankfurter's reasoning in Kovacs is equally applicable here: The legislature, controlled by public opinion, is the proper body to determine the terms under which automatic dialing-announcing devices "should be allowed to operate." The legislature's judgment on this issue is both reasonable and constitutional, and must be allowed to stand.

**F. Appellant Has Failed To Show That The
Trial Court Abused Its Discretion.**

To prevail on appeal, appellant must establish that the trial court abused its discretion in granting an injunction against appellant and in refusing to enjoin the State from enforcing the ADAD statute. For the reasons stated above, the trial court acted well within its discretion in enjoining appellant from continuing to violate this public protection law, and in refusing to enjoin the State from enforcing this statute. Accordingly, the trial court's injunction must be affirmed.

CONCLUSION

For all the foregoing reasons, the Attorney General respectfully requests that the trial court's order granting the State's motion for an injunction and denying appellant's motion for an injunction be affirmed.

Dated: Feb. 3, 1992

Respectfully submitted,

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A handwritten signature in black ink, appearing to read 'James P. Jacobson', written over a horizontal line.

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